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No.

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

HAGGAR APPAREL COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether regulations issued by the Treasury Department under the Tariff Act are entitled to deference in determining the proper tariff classification of imported goods.

2. Whether 19 C.F.R. 10.16(c) reasonably interprets the statutory phrase "operations incidental to the assembly process" in Subheading 9802.00.80 of the Harmonized Tariff Schedule of the United States to exclude the "permapressing" of items of clothing assembled abroad.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-4a) is reported at 127 F.3d 1460. The opinion of the Court of International Trade (App., *infra*, 7a-24a) is reported at 938 F. Supp. 868.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1997. A petition for rehearing was denied on February 20, 1998 (App., *infra*, 5a-6a). On May 7, 1998, the Chief Justice extended the time for filing a petition for a writ of certiorari to June 20, 1998. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. 28 U.S.C. 2643(b) provides:

> If the Court of International Trade is unable to determine the correct decision on the basis of the evidence presented in any civil action, the court may order a retrial or rehearing for all purposes, or may order such further administrative or adjudicative procedures as the court considers necessary to enable it to reach the correct decision.

2. General Headnote 11 of the Tariff Schedules of the United States, 19 U.S.C. 1202, provides:

> The Secretary of the Treasury is hereby authorized to issue rules and regulations governing the admission of articles under the provisions of the schedules. The allowance of an importer's claim for classification, under any of the provisions of the schedules which provide for total or partial relief from duty or other import restrictions on the basis of facts which are not determinable from an examination of the article itself in its condition as imported, is dependent upon his complying with any rules or regulations which may be issued pursuant to this headnote.

3. Subheading 9802.00.80 of the Harmonized Tariff Schedule of the United States, 19 U.S.C. 1202, provides that, with respect to:

> Articles * * * assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating and painting[, the duty that is to be paid is to be calculated] upon the full value of the imported article, less the cost or value of such products of the United States * * * .

4. 19 C.F.R. 10.16(c) provides:

> Any significant process, operation, or treatment other than assembly whose primary purpose is the fabrication, completion, physical or chemical improvement of a component, or which is not related to the assembly process, whether or not it effects a substantial transformation of the article, shall not be regarded as incidental to the assembly and shall preclude the application of the exemption to such article. The following are examples of operations not considered incidental to the assembly as provided under subheading 9802.00.80, Harmonized Tariff Schedule of the United States (19 U.S.C. 1202):
>
> (1) Melting of exported ingots and pouring of the metal into molds to produce cast metal parts;
>
> (2) Cutting of garment parts according to pattern from exported material;
>
> (3) Painting primarily intended to enhance the appearance of an article or to impart distinctive features or characteristics;

(4) Chemical treatment of components or assembled articles to impart new characteristics, such as showerproofing, permapressing, sanforizing, dying or bleaching of textiles;

(5) Machining, polishing, burnishing, peening, plating (other than plating incidental to the assembly), embossing, pressing, stamping, extruding, drawing, annealing, tempering, case hardening, and any other operation, treatment or process which imparts significant new characteristics or qualities to the article affected.

STATEMENT

1. Haggar Apparel Company brought this suit in the United States Court of International Trade to recover customs duties paid under protest in 1988 and 1989. The duties were paid by Haggar in connection with the importation of slacks that had been assembled in Mexico from components manufactured in the United States. While in Mexico, the garments had also been subjected to a "permapressing" operation that involved the pressing and oven baking of components to which a chemical resin had been applied. This process is designed to make the garment wrinkle-free and thus to eliminate the need for ironing after laundering (App., *infra*, 8a-9a). As the trial court stated, "The most important performance characteristics of [the Haggar] pants are crease retention and seam and surface flatness; the pants are 'wash and wear' garments" (*id.* at 8a).

Under Subheading 9802.00.80 of the Harmonized Tariff Schedule of the United States, 19 U.S.C. 1202,

an importer is entitled to a partial duty allowance for:[1]

> Articles * * * assembled abroad in whole or in part of fabricated components, the product of the United States, which * * * (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating and painting.

Pursuant to authority conferred on the Secretary of the Treasury "to issue rules and regulations governing the admission of articles under the provisions of the schedules" (19 U.S.C. 1202, General Headnote 11), the Treasury has specified by regulation that "[a]ny significant process, operation, or treatment other than assembly whose primary purpose is the * * * physical or chemical improvement of a component * * * shall not be regarded as incidental to the assembly" and therefore does not qualify for the duty exemption. 19 C.F.R. 10.16(c). Under this standard, the duty exemption is specifically not available when any "[c]hemical treatment" has been applied to "articles to impart new characteristics, such as showerproofing, permapressing, sanforizing, dying or bleaching of textiles" (19 C.F.R. 10.16(c)(4)).

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[1] Pursuant to 19 U.S.C. 3004, the Harmonized Tariff Schedule of the United States (HTSUS) was implemented into law on January 1, 1989. The HTSUS supplanted the former provisions of the Tariff Schedule of the United States (TSUS) on that date. Item 807.00 of TSUS, which applied prior to January 1, 1989, is identical to Subheading 9802.00.80 of HTSUS. References in this petition to Subheading 9802.00.80 of HTSUS thus apply equally to Item 807.00 of TSUS.

The "permapressing" that Haggar applied to the garments in Mexico thus disqualifed them from duty-free reentry under the direct text of the regulations. Haggar paid the required duties and then brought this refund suit in the United States Court of International Trade (App., *infra*, 7a, 9a).

2. The United States Court of International Trade has exclusive jurisdiction to review protests from Customs Service determinations. 28 U.S.C. 1581(a). The court rejected the Customs Service determination in this case and directed that the duties be refunded to Haggar (App., *infra*, 7a-24a, 25a-26a).

a. The Court of International Trade rejected the government's position that 19 C.F.R. 10.16(c)(4) controls this case. The court stated that the regulation is inconsistent with the "plain language" of the statute, which "does not prohibit operations which merely *impart new characteristics* to the article being assembled as the regulation provides, but in fact permits a duty allowance for such improvements to the articles so long as the operation imparting those characteristics was incidental to assembly" (App., *infra*, 23a). The court rejected the agency's assertion that its regulatory interpretions of the Tariff Act are entitled to deference under this Court's decision in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984). The court stated that the Federal Circuit has "declin[ed] to apply *Chevron* deference to Customs in routine classification decisions" (App., *infra*, 23a, citing, *e.g.*, *Crystal Clear Industries* v. *United States*, 44 F.3d 1001, 1003 (Fed. Cir. 1995)) and has even "ignored the regulation altogether" (App., *infra*, 23a, citing *Chrysler Corp.* v. *United States*, No. 95-1366, 1996 WL 132263, at *2 (Fed. Cir. Mar. 22, 1996); *General Motors*

Corp. v. *United States*, 976 F.2d 716, 718 (Fed. Cir. 1992); *United States* v. *Oxford Industries, Inc.*, 668 F.2d 507 (C.C.P.A. 1981); *United States* v. *Mast*, 668 F.2d 501, 506 (C.C.P.A. 1981)).

The court explained that it would not give deference to the agency's regulations under the Tariff Act because 28 U.S.C. 2643(b) directs the Court of International Trade "to reach the correct decision" (*ibid.*) in the cases that come before it. The court stated that this "statutory obligation to find the correct result limits the court's ability to give special *Chevron* deference" to the Treasury regulations issued under the Tariff Act (App., *infra*, 23a-24a, quoting *Anval Nyby Powder AB* v. *United States*, 927 F. Supp. 463, 469 (Ct. Int'l Trade 1996)).

b. Having thus rejected any role for the agency's regulations in interpreting the highly detailed classifications contained in the Tariff Act, the court found it necessary to apply a set of judicially created factors to determine *de novo* whether Haggar's permapressing operation is "incidental to the assembly process" and therefore within the scope of the duty exemption provided in Subheading 9802.00.80 of the Harmonized Tariff Schedule. As a source for such judicially-created factors, the court looked to the decision of the Federal Circuit in *United States* v. *Mast*, 668 F.2d at 506 & n.7. In *Mast*, the Federal Circuit held that, in determining whether a process is "incidental to assembly" for purposes of the tariff exemption, courts should consider (i) whether the cost and time required by the ostensibly "incidental" operation "may be considered 'minor'" compared to the cost and time "required for assembly of the whole article," (ii) whether the operation is "necessary to the assembly process," (iii) whether the operation

is "so related to assembly that [it was] logically performed during assembly, and (iv) whether "economic or other practical considerations dictate that the operations be performed concurrently with assembly" (App., *infra*, 11a-12a). See also *General Motors Corp.* v. *United States*, 976 F.2d 716 (Fed. Cir. 1992).

Upon reviewing the evidence and "balancing the relevant factors," the Court of International Trade concluded that the permapressing operation is "'incidental to the assembly process' within the meaning of * * * subheading 9802.00.80, HTUS" (App., *infra*, 21a). The court acknowledged that some of the relevant "factors weigh against granting a duty allowance" because they reflect that permapresssing is not merely a "minor" adjunct to the assembly process (*id.* at 18a). For example, permapressing entails substantial additional capital costs (*ibid.*) and takes up approximately one-third of the total time involved in the foreign processing of the garments (*id.* at 19a). The court also agreed with the agency that permapressing procedures are "not necessary, nor related to assembly" (*ibid.*). The court nonetheless emphasized that, "to minimize damages and economic costs," permapressing "would logically occur" at the time of assembly (*id.* at 21a). Because "economic and practical considerations dictate" that permapressing occur "concurrent with assembly," the court concluded that the permapressing operation was "incidental to the assembly process" within the meaning of the statutory duty exemption (*ibid.*).

3. The Federal Circuit has exclusive jurisdiction to review the final decisions of the Court of International Trade. 28 U.S.C. 1295(a)(5). On appeal from the decision in this case, the Federal Circuit affirmed (App., *infra*, 1a-4a).

The court of appeals held that the Court of International Trade had properly ignored the agency's regulations and had correctly applied the *Mast* factors in determining that the permapressing of the Haggar slacks was "incidental to the assembly process" and therefore within the customs exemption (App., *infra*, 3a). The court of appeals concluded that the Treasury regulations interpreting customs classifications are legally irrelevant and are entitled to no weight (*id.* at 3a-4a):

> [T]he [trial] court properly rejected the United States' argument that Customs' regulations interpreting and applying this statute are entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984). As we have recently held in several cases, the United States' argument is without merit. *See Rollerblade, Inc. v. United States*, 112 F.3d 481, 483 (Fed. Cir. 1997) (no *Chevron* deference applies to classification decisions); *Universal Elecs., Inc. v. United States*, 112 F.3d 488, 491-93 (Fed. Cir. 1997) ("neither this court nor the Court of International Trade defers to Custom's [*sic*] interpretation of a tariff heading on the basis of special deference pursuant to [*Chevron*]").

The court of appeals reasoned that the Treasury regulations are not entitled to the deference required by *Chevron* because "the Court of International Trade is * * * charged with the duty to 'reach the correct decision'" in the cases within its jurisdiction under 28 U.S.C. 2643(b) (App., *infra*, 4a, quoting *Rollerblade, Inc.* v. *United States*, 112 F.3d 481, 484 (Fed. Cir. 1997)).

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals departs from the consistent decisions of this Court that accord deference to the formal interpretations of statutes adopted by agencies charged with their implementation. The proffered reason for this holding—that the Court of International Trade is directed to "reach the correct decision" in cases within its jurisdiction (28 U.S.C. 2643(b))—does not provide even a plausible basis for this radical departure from settled principles of administrative law. *Every* court is charged with the duty to "reach the correct decision" in the cases that come before it.

Denying deference to the Treasury regulations that interpret the detailed classification provisions of the Tariff Act has serious practical consequences. Both importers and the Customs Service are now left without effective guidance for a wide range of transactions. Under the decision in this case, the ultimate application of customs provisions often cannot be determined or even reliably predicted except upon completion of judicial proceedings that occur well after the relevant transactions have been planned and conducted. The petition for a writ of certiorari should be granted because of the clear departure of the decision below from the standards of deference required by the decisions of this Court and because of the exceptional importance of the questions presented to the planning of commercial transactions and to the administration of the customs laws.

1. a. It has long been a bedrock legal principle that courts are to accord deference to the formal interpretations of a statute adopted by the agency that has been "charged with responsibility for administering

the provision" by Congress. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984). See, *e.g.*, *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996) ("It is our practice to defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering."); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *McLaren* v. *Fleischer*, 256 U.S. 477, 481 (1921); *Brown* v. *United States*, 113 U.S. 568, 570-571 (1885); *United States* v. *Pugh*, 99 U.S. 265, 269 (1878); *Edwards's Lessee* v. *Darby*, 25 U.S. (12 Wheat.) 206, 210 (1827). The deference that this Court has consistently accorded to agency interpretions in decisions such as *Chevron* is fully applicable here.

The regulations involved in this case were issued pursuant to the express delegation by Congress of authority to the Secretary of the Treasury "to issue rules and regulations governing the admission of articles under the provisions of the tariff schedule." 19 U.S.C. 1202, General Headnote 11 of TSUS.[2] We "have before us here a full-dress regulation, issued by the [Commissioner of Customs, with the approval of the Secretary of the Treasury,] and adopted pursu-

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[2] General Note 20 of HTSUS contains similar language. See note 1, *supra*. Congress has specified that "[t]he Customs Service shall, under rules and regulations prescribed by the Secretary," determine "the final appraisement of merchandise" and "fix the final classification and rate of duty applicable to such merchandise" (19 U.S.C. 1500(a), (b)). In enacting the HTSUS in 1988 (see note 1, *supra*), the Conference Report emphasized that "[t]he Customs Service will be responsible for interpreting and applying the Harmonized Tariff Schedules of the United States" (H. R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 549-550 (1988)).

ant to the notice-and-comment procedures of the Administrative Procedure Act designed to assure due deliberation" (*Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. at 741).[3] Courts are to defer to the agency's interpretation in this setting "because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Id.* at 740-741.

This Court has frequently emphasized that substantial deference is owed to the formal Treasury regulations that interpret the highly complex and detailed revenue laws: "the task that confronts us is to decide, not whether the Treasury regulation represents the best interpretation of the statute, but whether it represents a reasonable one." *Atlantic Mutual Ins. Co.* v. *Commissioner*, 118 S. Ct. 1413, 1418 (1998). Accord *Cottage Savings Ass'n* v. *Commissioner*, 499 U.S. 554, 560-561 (1991). This high degree of deference to Treasury regulations serves the important function of enhancing predictability in the application of the often intricate and intertwined revenue provisions that shape, and indirectly govern, virtually all forms of economic activity. See, *e.g.*, *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 477 (1979).

By ignoring the duly promulgated regulations in this case, the decision of the court of appeals erodes

[3] Treasury Department Order No. 165, T.D. 53160 (Dec. 15, 1952), provides that regulations under the Tariff Act "shall be prescribed by the Commissioner of Customs, with the approval of the Secretary of the Treasury."

the authority conferred on the agency by Congress to establish rules and regulations "to secure a just, impartial, and uniform appraisement of imported merchandise and the classification and assessment of duties" (19 U.S.C. 1502(a)). The decision also undermines the political role of the Executive Branch in the execution of foreign trade policy. As this Court stated in *Chevron*, 467 U.S. at 865-866:

> While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.
>
> When a challenge to an agency construction of a statutory provision * * * really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.

b. The sole rationale offered by the Federal Circuit for its refusal to give any weight to the applicable Treasury regulations is that 28 U.S.C. 2643(b) directs the Court of International Trade to "reach the correct decision" in the cases within its jurisdiction (Pet. App. 4a, quoting *Rollerblade, Inc.* v. *United States*, 112 F.3d at 484). That rationale is unpersuasive for two reasons. First, it does not distinguish

the Court of International Trade from any other court, for *all* courts are obviously charged with the responsibility of "reach[ing] the correct decision" in the cases that come before them. See note 4, *infra*. Second, the provision on which the court of appeals relies, when read in its entirety, does nothing more than provide various procedural options for the Court of International Trade when that court is not satisfied with the state of the evidentiary record in the case before it. The statute states in its entirety (28 U.S.C. 2643(b)):

> If the Court of International Trade is unable to determine the correct decision on the basis of the evidence presented in any civil action, the court may order a retrial or rehearing for all purposes, or may order such further administrative or adjudicative procedures as the court considers necessary to enable it to reach the correct decision.

This statute obviously does not provide, either in words or by plausible inference, that the traditional rule of deference to agency interpretations has no role in tariff classification disputes.[4] Courts that

[4] The Hobbs Act, which governs judicial review of orders from several independent federal regulatory agencies, contains an analogous provision that details the procedural options available to a reviewing court to supplement the evidentiary record. See 28 U.S.C. 2347. The courts that review agency decisions under the Hobbs Act have consistently followed this Court's mandate in *Chevron* and have deferred to reasonable agency interpretations of ambiguous statutory provisions. See, *e.g.*, *American Trucking Ass'ns, Inc.* v. *Federal Highway Administration*, 51 F.3d 405, 408 (4th Cir. 1995); *American Mining Congress* v. *Nuclear Regulatory Commission*, 902 F.2d 781, 784 (10th Cir. 1990); *CSX Transportation* v. *United States*, 867 F.2d 1439, 1442 (D.C. Cir. 1989).

The Administrative Procedure Act (APA) applies generally to federal agency practice and procedure. That statute directs the reviewing courts to "decide all relevant questions of law" and to "interpret * * * statutory provisions." 5 U.S.C. 706. Under the reasoning applied by the Federal Circuit in this case, that statute would arguably provide an even more authoritative basis than 28 U.S.C. 2643(b) for a reviewing court to disregard an agency's reasonable statutory interpretations. In judicial review under the APA, however, courts have consistently followed *Chevron* and deferred to agency interpretations of statutes. See, *e.g.*, *Seldovia Native Association, Inc.* v. *Lujan*, 904 F.2d 1335, 1342 (9th Cir. 1990); *Kansas City Southern Industries, Inc.* v. *Interstate Commerce Commission*, 902 F.2d 423, 430 (5th Cir. 1990).

properly apply the traditional rule of deference *do* "reach the correct decision," and those that fail in that responsibility do not.

The legislative history confirms what the language of the statute unambiguously shows: 28 U.S.C. 2643(b) is concerned only with the procedural remedies available to the Court of International Trade when a factual record is inadequate. See H.R. Rep. No. 1235, 96th Cong., 2d Sess. 60 (1980).[5] Nothing in the text or history of this statute provides support for the extraordinary conclusion of the court of appeals

[5] The House Report states (H.R. Rep. No. 1235, *supra*, at 60):

> Subsection (b) is a new provision that empowers the Court of International Trade to remand the civil action before it for further judicial or administrative proceedings. In granting this remand power to the court, the Committee intends that the remand power be co-extensive with that of a federal district court. In addition, this subsection authorizes the court to order a retrial or rehearing to permit the parties to introduce additional evidence.

(App., *infra*, 4a) that, in customs cases, the Court of International Trade need not adhere to the decision of this Court in *Chevron*. Indeed, prior to the recent Federal Circuit decisions to the contrary, the Chief Judge of the Court of International Trade had acknowledged that that court, like all others, "must defer to the agency's interpretation of the statute" if it is "sufficiently reasonable," even though "the court might have reached a different result on its own" (Chief Judge Edward D. Re, *Litigation Before the United States Court of International Trade*, 19 U.S.C.A. §§ 1-1300, at XLI (West. Supp. 1998)).

2. Under the correct standard of deference appropriate for agency interpretations of "statutes that they are charged with administering" (*Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. at 739), the regulation should have been sustained. The language employed by Congress in the statutory customs exception for "operations incidental to the assembly process" (Subheading 9802.00.80 of HTSUS, 19 U.S.C. 1202) is not plain and unambiguous. And, the agency's determination that an operation such as "permapressing" is sufficiently distinct from "assembly" that it is *not* "incidental to the assembly process" is reasonable. The agency's formal regulatory interpretation of the statute should therefore have been upheld under this Court's decision in *Chevron*, 467 U.S. at 842-844.

a. Congress has not "directly spoken to the precise question [of statutory construction] at issue" in this case (*Chevron*, 467 U.S. at 842). The statute provides several specific examples of operations that are "incidental to the assembly process such as cleaning, lubricating and painting." Subheading 9802.00.80 of HTSUS, 19 U.S.C. 1202. That list of

concrete examples, however, does not address the myriad of other operations that can be performed abroad and does not indicate whether such other operations should be regarded as "incidental to the assembly process." Because Congress "left ambiguity in a statute meant for implementation by an agency," there is "a presumption that Congress * * * understood that the ambiguity would be resolved, first and foremost, by the agency" rather than by the courts. *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. at 740-741.

b. The question properly at issue in this case is therefore not whether the Treasury regulation "represents the best interpretation of the statute, but whether it represents a reasonable one." *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. at 744-745.[6] The regulation defines "assembly operations" to "consist of any method used to join or fit together solid components, such as welding, soldering, riveting, force fitting, gluing, laminating, sewing, or the use of fasteners" (19 C.F.R. 10.16(a)). The regulation then defines operations that are *not* incidental to the assembly process as "[a]ny significant process, operation, or treatment other than assembly" that (i) has the "primary purpose" of "the fabrication, completion, physical or chemical improvement of a component" or (ii) "is not related to the assembly process" (19 C.F.R. 10.16(c)). To provide more de-

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[6] Because the courts below applied an incorrect standard of deference in reviewing the regulation involved in this case, this Court may wish to consider summarily reversing the judgment and remanding the case to the court of appeals for that court to consider the validity of the regulation under the proper standard.

tailed guidance to the public, and to formalize the longstanding administrative position on this issue,[7] the agency listed several specific operations that are deemed *not* to be incidental to assembly under the regulation. Included among those specific examples is the "[c]hemical treatment of components or assembled articles to impart new characteristics, such as showerproofing, permapressing, sanforizing, dying or bleaching of textiles" (19 C.F.R. 10.16(c)(4)).[8]

That regulation constitutes a reasonable interpretation of the statute. As the courts below recognized, "permapressing" (i) is not necessary or related to the assembly of the garments, (ii) effects a significant improvement of the garments and (iii) consumes a substantial portion of the time and capital required in the foreign operations (App., *infra*, 20a-21a). By specifying that such operations are not "incidental" to assembly, the regulation gives effect to the ordinary meaning of the statutory text. A process can be "incidental" to assembly only if it occurs as "a minor

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[7] In Headquarters Ruling 027763 (Sept. 13, 1973), the Customs Service determined that permapressing is not an operation incidental to assembly for purposes of Item 807.00 of the TSUS. See note 1, *supra*.

[8] In addition to these examples, the regulation further specifies that garment cutting, decorative pairting and metalworking operations are *not* incidental to assembly. 19 C.F.R. 10.16(c)(2), (3), and (5). The regulation identifies some operations that *do* qualify as "incidental to assembly," such as cleaning; rust, grease, and paint removal; application of preservative coatings and trimming and folding. 19 C.F.R. 10.16(b). These examples are consistent with the understanding of the statute expressed in its legislative history. See H.R. Rep. No. 342, 89th Cong., 1st Sess. 49 (1965).

concomitant" of the assembly process (*Webster's Third New International Dictionary* 1142 (1976)).

By "balancing" the factors described by the Federal Circuit in the *Mast* case, however, the courts below concluded that the statutory standard should be deemed satisfied simply because, as a practical or "economic" matter, it is efficient for "permapressing" to be done "concurrent with assembly" (App., *infra*, 21a). The *ad hoc* adjudicative approach required by application of the *Mast* factors in customs cases is inevitably time-consuming, expensive and prone to inconsistency. Even if the result obtained through the "balancing" of various subjective factors could yield *a* reasonable application of the statute, it is plainly not the *only* reasonable method of implementing the statutory phrase "incidental to the assembly process."

Congress authorized the Treasury, not the courts, to "issue rules and regulations governing the admission of articles under the provisions of the tariff schedule." General Headnote 11 of TSUS, 19 U.S.C. 1202. The regulations adopted by the agency should have been sustained because they are not "unreasonable" and are not "plainly inconsistent with the revenue statutes." *Commissioner* v. *Portland Cement Co.*, 450 U.S. 156, 169 (1981), quoting *Commissioner* v. *South Texas Lumber Co.*, 333 U.S. 496, 501 (1948).

c. The Court of International Trade erred in concluding (App., *infra*, 23a) that the agency's regulation conflicts with the plain language of the statute. The court based that conclusion on its assumption that the regulation precludes every operation that "*imparts new characteristics*" to an article from being regarded as "incidental to assembly" (*ibid.*). That as-

sumption is based upon a misreading of the plain text of the regulation.

The regulation does not state, as the lower court suggested, that *any* process that "*imparts new characteristics*" to goods cannot be regarded as "incidental to assembly." Instead, the regulation defines "[o]perations not incidental" to the assembly process to include (19 C.F.R. 10.16(c)):

> [a]ny significant process, operation, or treatment other than assembly whose primary purpose is the fabrication, completion, physical or chemical improvement of a component, or which is not related to the assembly process.

In general, the regulation thus excludes from the duty exception only those operations that are "not related to the assembly process" or whose "primary purpose" is "improvement of a component" rather than assembly. Neither of the courts below has suggested that there is any flaw in that general regulatory definition of the statutory concept of "incidental to assembly." Indeed, the language criticized by the courts below—concerning operations that "impart new characteristics" to goods—does not even appear in that general definition.

The language criticized by the courts below appears only in the subsection of the regulation that addresses operations that involve the "[c]hemical treatment of components or assembled articles [of clothing] to impart new characteristics, *such as showerproofing, permapressing, sanforizing, dying or bleaching of textiles*" (19 C.F.R. 10.16(c)(4)) (emphasis added). That language specifies only that such "[c]hemical treatment" of clothing as "permapressing" does not qualify as "incidental" to assembly under the statute. *Ibid.* This portion of the regulation is justified by the fact that chemical processes such as "permapressing" (i) are not necessary or related to assembly, (ii) impart new characteristics to clothing and (iii) entail substantial time and capital requirements (App., *infra*, 21a). The narrow, focussed administrative determination that such operations are not "incidental to the assembly process" is neither "unreasonable" nor "plainly inconsistent" with the statute and therefore "must be sustained" (*Commissioner* v. *Portland Cement Co.*, 450 U.S. at 169).

3. The Court of International Trade has exclusive jurisdiction over tariff protest cases, and the Federal Circuit has exclusive jurisdiction over appeals from the Court of International Trade. The decision in this case is thus binding throughout the Nation. In similar circumstances, this Court has recognized the need for plenary review of Federal Circuit decisions of significant fiscal and administrative importance. See, *e.g.*, *United States* v. *Hill*, 506 U.S. 546, 549 (1993); *United States* v. *Goodyear Tire & Rubber Co.*, 493 U.S. 132, 138 (1989); *United States* v. *American Bar Endowment*, 477 U.S. 105, 109 (1986). Such review is appropriate in this case.

a. The question presented in this case has substantial legal and practical importance. In the past, formal Treasury interpretations of tariff legislation have been accorded substantial deference. See *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978); *United States* v. *89 Bottles of "Eau de Joy"*, 797 F.2d 767, 771 (9th Cir. 1986). This was true in the Federal Circuit as well. See *Guess? Inc.* v. *United States*, 944 F.2d 855, 858 (Fed. Cir. 1991); *Generra Sportswear Co.* v. *United States*, 905 F.2d 377, 379 (Fed Cir. 1990);

Mitsui Foods, Inc. v. *United States*, 867 F.2d 1401, 1403 (Fed. Cir. 1989); *DAL-Tile Corp.* v. *United States*, 829 F. Supp. 394 (Ct. Int'l Trade 1993). That court, however, has now purportedly discovered in the text of a remote procedural statute a radical legislative departure from the longstanding rule of deference to administrative interpretations.

It is only recently that the Federal Circuit has held that, in enacting 28 U.S.C. 2643(b), Congress directed the courts to give no weight to Treasury interpretations of the Tariff Act. That conclusion first appeared as dicta in *Crystal Clear Indus.* v. *United States*, 44 F.3d at 1003*. It has now been adopted and applied in a number of customs cases. See, *e.g.*, *IKO Industries* v. *United States*, 105 F.3d 624, 626 (Fed. Cir. 1997); *Rollerblade, Inc.* v. *United States*, 112 F.3d 481, 483 (Fed. Cir. 1997); *Universal Electronics, Inc.* v. *United States*, 112 F.3d 488, 491-493 (Fed. Cir. 1997); *Better Home Plastics Corp.* v. *United States*, 119 F.3d 969, 971 (Fed. Cir. 1997); *Midwest of Cannon Falls, Inc.* v. *United States*, 122 F.3d 1423, 1426 (Fed. Cir. 1997); *Sharp Microelectronics Technology, Inc.* v. *United States*, 122 F.3d 1446, 1449 (Fed. Cir. 1997); *Anhydrides & Chemicals, Inc.* v. *United States*, 130 F.3d 1481, 1486 (Fed. Cir. 1997). In these decisions, the Federal Circuit has repeatedly relied on the implausible theory that the statutory directive that the Court of International Trade is to "reach the correct result" (28 U.S.C. 2643(b)) trumps the traditional deference owed to agency interpretations. See pages 13-16, *supra*. Because the Federal Circuit rejected the government's request for rehearing en banc in this case, the issue now appears to be beyond correction in that circuit.

Paradoxically, the Federal Circuit continues to accord *Chevron* deference to Treasury interpretations of the Tariff Act in customs *valuation* cases. *Goodman Mfg., L.P.* v. *United States*, 69 F.3d 505, 508 (Fed. Cir. 1995). In *IKO Industries* v. *United States*, 105 F.3d at 626, the Federal Circuit distinguished those cases on the ground that they "did not involve a classification dispute but rather a dispute regarding the proper valuation." This establishes an artificial and untenable distinction between the two "traditional categor[ies] of [customs] litigation" (Re, *supra*, at XXIV). Whatever meaning there is to the statutory directive that the Court of International Trade "reach the correct result" in customs cases (28 U.S.C. 2643(b)), that statute applies equally to *all* types of tariff litigation. Congress did not establish different standards of review for valuation cases than for classification cases, and there is no logical basis to create such a distinction.[9]

If 28 U.S.C. 2643(b) has the meaning adopted by the Federal Circuit in this case, that statute would be the only instance of which we are aware in which Congress has stripped an agency of the deference to which its interpretations are traditionally entitled. See note 4, *supra*. The unique conclusion reached by the Federal Circuit in interpreting this statute has, moreover, been derived from the most modest of statutory texts. See page 14, *supra*. And, in reaching that unique conclusion, the court of appeals failed even to acknowledge or address the "presumption" that Congress intends statutory ambiguities to be

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[9] Classification cases constitute the most common type of tariff dispute, for they comprise approximately 80 percent of the customs cases that reach the courts.

"resolved, first and foremost, by the agency" charged with the duty of administering the statute, "rather than the courts" (*Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. at 740-741). Review is warranted in this case because of the extraordinary departure of the Federal Circuit from the consistent decisions of this Court.

b. The decision of the court of appeals has substantial practical importance. By denying deference to the Treasury regulations that interpret the detailed classification provisions of the Tariff Act, the Federal Circuit has left both importers and the Customs Service without effective guidance for a wide range of transactions. Because the agency's interpretive regulations have been deprived of any effect, the ultimate application of customs provisions cannot now be determined until completion of a cumbersome, case-by-case inquiry to obtain an *ad hoc* judicial "balancing [of] the relevant factors" (App., *infra*, 21a). Moreover, as the Federal Circuit has pointed out, the list of the "relevant factors" to be applied in such judicial proceedings may vary from situation to situation. *General Motors Co.* v. *United States*, 976 F.2d at 720. Since the "balancing" of such "relevant factors" is an inherently subjective inquiry, it is obvious that different triers of fact could reach different results on similar sets of facts. For example, two permapressing operations, even if descriptively similar, could yield different tariff results depending upon whether or not "economics and practicality dictate" that "the curing of the fabric would logically occur * * * concurrent with assembly" (App., *infra*, 21a). The result of the *ad hoc* approach adopted in this case—and of the court's refusal to give any weight to the agency's interpretive regulations—is expensive customs litigation and unpredictable outcomes.

The appropriation by the Federal Circuit of the statutory authority of the Treasury Department to issue binding regulations under the Tariff Act is inherently a matter of substantial public importance. The decision below disables the Customs Service from providing effective, advance guidance to the public concerning the application of the customs laws to discrete transactions. As a result, manufacturers will be unable, at the time they plan their transactions, to predict with reliability their tax obligations. Review of the decision below is appropriate because of the serious, recurring importance of the questions presented both to the administration of the customs laws and to the commercial activities to which those laws apply.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1998

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 97-1002

HAGGAR APPAREL CO., PLAINTIFF-APPELLEE

v.

THE UNITED STATES, DEFENDANT-APPELLANT

Decided: October 22, 1997

Before: RICH, NEWMAN, and CLEVENGER, Circuit Judges.

RICH, Circuit Judge.

This appeal in a so-called "American-goods-returned" case is from the decision by the United States Court of International Trade of 25 July 1996 in case number 93-06-00343 ordering the United States to grant a duty allowance for the goods in question. We affirm.

BACKGROUND

The merchandise at issue in this case consists of men's and women's permanent-press, wrinkle-free trousers that are assembled in Mexico from resin-impregnated fabric components made in the U.S. Plaintiff-appellee, Haggar Apparel Co. ("Haggar"), sells a line of such garments under the mark PRESTIGE. There are three types of fabric used to make

the PRESSTIGE garments: pre-cured fabrics in which the impregnating resin is cured before assembly into garments; synthetic fabrics which require pressing, but not curing; and post-cured fabrics that require curing after assembly into garments. While only those garments made with the third type of fabric—the post-cured fabric—are at issue in this case, all of the Haggar PRESSTIGE products are assembled, tagged, and packaged in Mexico for distribution in the U.S. Indeed, except for the brief detour required to cure the post-cured fabric, all of the PRESSTIGE products are processed in the same plants and undergo the same assembly, tagging, and other processing steps.

OPINION

The issue in this case is whether the oven-baking process used to cure Haggar's post-cure fabric is an operation that is "incidental to assembly" under the tariff laws. The issue arises because the tariff provisions provide a partial duty allowance for certain U.S.-made components that are assembled outside the U.S. for return to the U.S. so long as the components are not advanced in value or improved in condition "except [by the actual assembly itself or] by operations [which are] incidental to the assembly process." Item 807.00, Tariff Schedules of the United States (1988) (for pre-1989 entries) and subheading 9802.00.80, Harmonized Tariff Schedule of the United States (1989).

The Court of International Trade, in a thorough opinion by Chief Judge DiCarlo, correctly applied the test set forth in the decision of this court's predecessor court in *United States v. Mast Indus., Inc.*, 668 F.2d 501 (C.C.P.A. 1981), to determine whether

ovenbaking is an operation that is incidental to assembly. In so doing, the court began its analysis by properly rejecting as overly restrictive the United States' argument that the term "assembly" means the joinder of two components. Instead, the court properly concluded that certain minor operations are not merely incidental to assembly, but are so integral to the process as to merge with it. The court then diligently applied the factors applied by this court's predecessor in *Mast*, to analyze the curing operation at issue in this case. After balancing the relevant *Mast* factors, the court correctly concluded that the curing operation is "incidental to the assembly process" within the meaning of the statute.

The court next properly rejected the United States' argument that although "incidental to assembly," the curing process may nonetheless fall outside of the statute's tariff shelter if the process caused a prohibited advancement in value. The court looked to the express language of the statute and correctly concluded that the statute does not prohibit advancement in value where the operation in question is incidental to the assembly process.

Finally, the court properly rejected the United States' argument that Customs' regulations interpreting and applying this statute are entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984). As we have recently held in several cases, the United States' argument is without merit. *See Rollerblade, Inc. v. United States*, 112 F.3d 481, 483 (Fed. Cir. 1997) (no *Chevron* deference applies to classification decisions); *Universal Elecs. Inc. v. United States*, 112 F.3d 488, 491-93 (Fed. Cir. 1997) ("neither

this court nor the Court of International Trade defers to Custom's interpretation of a tariff heading on the basis of special deference pursuant to [*Chevron*]"). Acknowledging the procedural importance of presumptions, the Court of International Trade is nonetheless charged with the duty to "reach the correct decision." *Rollerblade*, 112 F.3d at 484 (quoting 28 U.S.C. § 2643(b)). On appeal, we review the findings of that court—not those of Customs—for clear error; while we decide questions of law *de novo*. *Universal Elecs.*, 112 F.3d at 491.

CONCLUSION

The decision of the Court of International Trade was correct for the reasons stated in its opinion. Therefore, we affirm.

AFFIRMED

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 97-1002
CIT-93-06-00343

HAGGAR APPAREL CO., PLAINTIFF-APPELLEE

v.

THE UNITED STATES, DEFENDANT-APPELLANT

[Entered: Feb. 20, 1998]

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT, and a response thereto having been invited by the court and filed by the APPELLEE, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on February 27, 1998.

FOR THE COURT,
JAN HORBALY, CLERK

Dated: February 20, 1998

By /s/ ALEX VAN VEEN /amt
ALEX VAN VEEN
Staff Law Clerk

cc: SAUL DAVIS
EDWARD M. JOFFE
BRUCE G. FORREST

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* Note: Pursuant to Fed. Cir. R. 47.6, this order is *
* not citable as precedent. It is a public record. *
****

APPENDIX C

UNITED STATES
COURT OF INTERNATIONAL TRADE

No. 93-06-00343
Slip Op. 96-110

HAGGAR APPAREL COMPANY, PLAINTIFF

v.

UNITED STATES, DEFENDANT

Decided: July 12, 1996

Before: DICARLO, Chief Judge.

OPINION AND JUDGMENT ORDER

DICARLO, Chief Judge: Plaintiff, Haggar Apparel Company challenges the denial of protests filed pursuant to section 515 of the Tariff Act of 1930, 19 U.S.C. § 1515 (1988). Haggar contends the United States Customs Service erroneously denied a duty allowance for fabric components manufactured in the United States and shipped to Mexico for assembly into men's pants. Jurisdiction is proper under 28 U.S.C. § 1581(a) (1988). The court finds the merchandise in question is entitled to a duty allowance.

BACKGROUND

The imported merchandise consists of men's pants assembled in Mexico from components manufactured in the United States. (Stip. Facts ¶¶ 9, 43.) Haggar markets these pants under the "Presstige" name. The most important performance characteristics of Presstige pants are crease retention and seam and surface flatness; the pants are "wash and wear" garments. (Tr. at 11-12, 40; Stip. Facts ¶¶ 18-19.)

Haggar achieves its performance requirements by using a "pre-cured," "post- cured," or pure synthetic fabric. (Stip. Facts ¶ 18.) Curing involves the application of heat to fabric treated with resin. Under the pre-cured method, resin and heat are both applied at the textile mill; Haggar purchases the fabric, cuts it to shape, assembles the components, and presses the completed garment. (Stip. Facts ¶ 20; Tr. at 12.) Under the post-cured approach, Haggar purchases resin-treated fabric from the mill, cuts, assembles, and presses the garment, and bakes it in a curing oven. *Id.* Both the pre-cured and post-cured methods use fabric of a cotton-synthetic blend, which is typically sixty percent cotton and forty percent polyester. (Stip. Facts ¶ 9; Tr. at 12.) Presstige pants made from a pure synthetic fabric require pressing, but do not require resin treatment or baking. (Tr. at 43.)

All methods for producing Presstige pants involve the same assembly and pressing process. *Id.* at 13. The only difference occurs after pressing. *Id.* In the post-cured method, the pants are loaded on an oven conveyer, baked, and unloaded from the conveyer. Improper pressing of the garment prior to the baking process will result in the product being sold as a "second," as proper pressing is essential to crease

retention and surface flatness. (Stip. Facts ¶ 41.) In addition, a crease defect cannot be reversed after oven-baking. *Id.*

The garments at issue are Model 245 Presstige pants imported by Haggar in 1988 and 1989. (Stip. Facts ¶ 36; Haggar's Customs Protest at 3-4.) These pants were made from fabric style 2010, which is a post-cured fabric comprised of sixty percent combed cotton and forty percent fortrel polyester. (Stip. Facts ¶ 39.) The fabric and other components, such as buttons, thread, zippers, and trim items, were manufactured in the United States. *Id.* ¶¶ 47-50. Haggar cut the resin-treated fabric to shape, and exported the fabric and remaining components to Mexico, where they were assembled into pants by Haggar's wholly owned subsidiary, Haggarmex. *Id.* ¶¶ 9, 43-52. Following assembly, pressing, and baking, Haggar attached hangtags and tickets to the pants and packaged and shipped them to the United States. (*Id.* ¶ 52; Tr. at 153-154.)

Upon importation, Haggar sought a duty allowance for pre-1989 entries under item 807.00 of the Tariff Schedule of the United States [hereinafter "TSUS"], and for the remaining entries under subheading 9802.00.80 of the Harmonized Tariff Schedule of the United States [hereinafter "HTSUS"]. Item 807.00, Subpart B, Part I, Schedule 8, TSUS (1987); Subheading 9802.00.80, Chapter 98, Section XXII, HTSUS (1987) (implemented into law on Jan. 1, 1989, pursuant to 19 U.S.C. § 3004 (1988)). Customs denied a duty allowance for the post-cured, cut-to-shape fabric components, but granted the duty allowance for all other components produced in the United States. For the post-cured fabric Customs assessed duties at the rate

of 16.5 percent *ad valorem* under TSUS item 381.62.40, and 17.7 percent ad valorem under HTSUS subheading 6203.42.40. (Stip. Facts ¶ 11.)

DISCUSSION

Customs is entitled to a presumption of correctness as to its factual determinations. *See* 28 U.S.C. § 2639(a)(1) (1988) (presumption); *see also Goodman Mfg., Inc. v. United States*, 69 F.3d 505, 508 (Fed. Cir. 1995) (limiting presumption to factual determinations). Plaintiff bears the burden of proving that Customs' determination is incorrect. 28 U.S.C. § 2639(a)(1).

Item 807.00(c) of the TSUS affords domestic goods exported for purposes of assembly a partial duty allowance upon re-entry into the United States. To qualify under item 807.00(c), fabricated components of the United States assembled abroad must not be advanced in value abroad outside of assembly and operations incidental to the assembly process. Item 807.00(c), TSUS. Item 807.00 provides:

> 807.00 Articles assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape, or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating, and painting.

Item 807.00, TSUS. Pursuant to item 807.00, Customs assesses a duty upon eligible merchandise based "upon the full value of the imported article, less the cost or value of such products of the United States." *Id.* The HTSUS provides an identical exemption under Subheading 9802.00.80.

The parties do not challenge that the imported merchandise was advanced in value or improved in condition abroad. Further, they agree that the articles were exported in condition ready for assembly without further fabrication and that the articles have not lost their physical identity. (Stip. Facts ¶¶ 44-45.) Therefore in determining whether the components qualify for an item 807.00 trade allowance, the dispositive issue is whether ovenbaking is an operation incidental to assembly. To answer this question, the court turns to the Federal Circuit's decision in *United States v. Mast Industries, Inc.*, 668 F.2d 501 (C.C.P.A. 1981).

I. The Mast Factors

To determine whether button-holing and pocket-slitting operations were incidental to assembly of women's pants, the court in *United States v. Mast* examined the following factors:

> (1) Whether the cost of the operation relative to the cost of the affected component and the time required by the operation relative to the time required for assembly of the whole article were such that the operation may be considered "minor."
>
> (2) Whether the operations in question were necessary to the assembly process....

(3) Whether the operations were so related to assembly that they were logically performed during assembly.

Mast, 668 F.2d at 506. The *Mast* court also indicated a fourth consideration: "whether economic or other practical considerations dictate that the operations be performed concurrently with assembly." *Id.* at n. 7. These factors are not exhaustive, and all factors may not be relevant in each case. *General Motors Corp. v. United States*, 976 F.2d 716, 719-20 (Fed. Cir. 1992). Nonetheless, the most basic question — whether such operations are of a minor nature incidental to the assembly process — remains the focus of the court's inquiry.

(A) Cost Comparisons

The first prong of the *Mast* comparisons examines whether the challenged operation constitutes a significant proportion of the total assembly process. To make this determination, the court must first define the scope of the challenged operation, because in making the cost determination, the court must weigh the expense and time costs of the challenged operation against the cost of assembly. According to plaintiff, the court should compare only ovenbaking against total assembly costs. (Haggar's Post Trial Br. at 1-2.)

Defendant argues the court must compare all non-assembly costs against only pure assembly expenses. (Def.'s Post Trial Br. at 2-3.) To accomplish this task, defendant first contends that operations included on the assembly side of the *Mast* comparisons are solely those operations which encompass the joinder of two solids. *Id.* at 16 & n.10. Defendant argues

that, at a minimum, the court must exclude *all* non-joinder operations, including minor chopping and trimming operations, from the assembly side of the *Mast* comparisons. *Id.* at 16-17.

Second, defendant contends the court must combine *all* non-joinder operations which were excluded from the assembly side of the *Mast* comparisons for comparison against pure assembly costs in order to ascertain whether the challenged operations were more than minor improvements, and therefore, not incidental to assembly. *Id.* According to defendant, failing to combine all non-joinder costs for comparison against pure assembly costs would result in a piecemeal analysis that would undermine "item 807.00 by allowing major and significant operations to be broken down to [a] point where each step could be called minor." *Id.* at 17 (quoting *General Motors*, 976 F.2d at 720). Defendant contends this court in *Surgikos, Inc. v. United States*, 12 Ct. Int'l Trade 242, 245 (1988) similarly combined all non-assembly operations for comparison against pure assembly operations in determining whether the challenged operations were minor and, therefore, incidental to assembly. *Id.* at 17-18.

The court disagrees with defendant's readings of *General Motors* and *Surgikos*. Neither decision demands that *all* non-joinder operations must be combined for comparison against only pure assembly functions. The Federal Circuit in *General Motors* disagreed with the lower court's "piecemeal analysis" because the lower court improperly sought to separate the various components of a single process— coating operations during automobile assembly— that should have been considered together. 976 F.2d at 720.

The Federal Circuit determined that isolating the various components of the coating operation for an item 807.00 allowance would have allowed importers to argue that each component of the challenged operation was minor, even though the operation as a whole was a significant process, and therefore not incidental to assembly. *Id. General Motors*, however, did not mandate combining *all* "non-joinder" functions with the coating operations when comparing expense and time costs against the cost of the affected components, and the duration of assembly, as defendant now urges. If this were the case, the Federal Circuit would have also grouped the other non-joinder processes including water testing, detail work, inspections, wheel alignment, and final drive tests with the coating operations in its *Mast* calculations. *See id.* at 717-18 (listing non-assembly operations).

Surgikos also fails to support defendant's position. *Surgikos* concerned the assembly of surgical sheets assembled in Mexico. Although the court in *Surgikos* did weigh the only two nonassembly operations — fenestration (creating a rectangular opening in the sheet) and finish folding (functional folding to maintain antiseptic conditions) — against the pure joinder operations, Customs had challenged *both* fenestration and finish folding as nonincidental to assembly; the joinder of the surgical sheets was the only remaining operation. 12 Ct. Int'l Trade at 243-44. Customs, by challenging *all* non-assembly operations as not being incidental to assembly, necessarily mandated that the court compare all non-assembly operations against pure assembly. The issue of whether all nonassembly operations must be weighed against pure assembly, however, was not before the court. The court therefore does not read *Surgikos* as broadly as defendant urges.

The court finds that the minor chopping, handling and trimming operations are not merely incidental to assembly, but are so integral to the process as to merge with it. (*See* Court's Findings, Tr. at 511) (noting that such processes are related to assembly and may also be part of assembly); *see also General Instrument Corp. v. United States*, 499 F.2d 1318, 1319-21 (C.C.P.A. 1974) (finding spooling, shaping & machine pressing, cement coating, cutting, stripping, and weaving of magnet and lead wire exported from the United States to Taiwan where wire was wound into coils and cable harnesses as constituting assembly for purposes of item 807.00). These minor operations include placing a notch into the zipper to facilitate the next assembly step, minor trimming of loose threads, simultaneous sewing and cutting of the fly lining, the cutting apart of bands (fabric belt encircling waist) & separation of excessive band lining, the sorting and placing of belt loop components together on a crimping machine to bond the components together, as well as certain supply and handling operations and various manipulations of the fabric so as to make further assembly more efficient. (Tr. at 128-40.) The court, therefore, rejects defendant's interpretation of assembly as purely the joinder of two components as overly restrictive.

The question remains whether pressing is part of the challenged operation compared against assembly. Haggar contends that the challenged operation consists solely of ovenbaking. (Haggar's Post Trial Br. at 1-2; Haggar's Post Trial Reply Br. at 9.) According to Haggar, pressing could not be part of the chal-

lenged operation because Customs has considered pressing by itself to be minor and incidental to assembly under item 807.00. *Id.* at 11. However, pressing is necessary to further the curing process. (*See* Stip. Facts ¶ 42) ("the post-curing process used on the [pants in issue] was achieved by pressing and oven-baking.") Although in a strict sense, pressing is not part of curing, as the actual heat-induced transformation of the fabric is performed during oven-baking, pressing is integrally related to Haggar's purpose in conducting the curing process, namely to develop crease retention and greater surface and seam flatness in its garments. (Stip. Facts ¶ 19; Tr. at 44.)

This decision is consistent with the decision of the Federal Circuit in *General Motors*. In *General Motors*, the Federal Circuit rejected the lower court's delineation of the challenged painting operation as too narrow, finding "that all coating operations performed upon the disputed components . . . must be considered in conjunction with topcoat painting operations to determine if coating operations, collectively, are minor incidents to assembly." 976 F.2d at 720.

The pressing operation, like the coating operations in *General Motors*, did not interfere with item 807.00's prescriptions when performed in isolation. However, when performed prior to ovenbaking, pressing does more than simply impart a temporary smoothness to the fabric. It begins the curing process which, once started, imparts permanent new characteristics to the pants. Thus, the entire curing operation in this case is analogous to the entire finish painting operation in *General Motors*; the court must

consider ovenbaking in conjunction with pressing when applying the *Mast* test.

Application of the first *Mast* factor involves comparing (1) the cost of the curing operation relative to the cost of the post-cured fabric component, including, pursuant to *General Motors*, the comparison of Haggar's investment in the curing operation versus its investment in the assembly process; and (2) the time required for curing, relative to the time required for assembly. *General Motors*, 976 F.2d at 719-21.

(i) Cost Comparisons of Curing Relative to the Cost of the Affected Components, and to the Cost of the Assembly Process

Dividing the cost of pressing and baking ($0.0529) by the cost of the fabric components ($3.08) indicates the curing operation constitutes 1.72 percent of the component cost.[1] (Joint Stip. at 2-3.) Further, comparing the cost of curing (again pressing and ovenbaking, $0.0529) against the total operation cost ($0.500) constitutes 10.6 percent. *Id.* The court does not find either figure significant. *See Mast*, 668 F.2d at 506 (finding 15% minor [$0.003 of $0.020 in percentage terms]).

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[1] The parties stipulated that overhead costs of "factory supplies, pressing expense, H & O repair, H & O repair parts, porters, office security guard, boiler maintenance, cook, legal, doctor, severance pay, unemployment, insurance (unemployment and insurance are two separate parts), dues and subscription, telephone, employee benefits, other professional fees, office supplies, janitor supplies, travel, auto expense[s], advertising and building maintenance cannot be allocated to the pants at issue," or to a division of assembly versus nonassembly costs. (Parties' Stip., Tr. at 535.) The court therefore makes *Mast* cost comparisons exclusive of overhead.

(ii) Capital Investment Comparisons

The court in *General Motors* also found a capital investment determination relevant to the cost analysis. 976 F.2d at 721. Defendant argues that proper analysis under this factor requires the use of replacement costs, as supplied by the parties in their cost stipulations. (Def.'s Post Trial Br. at 21, 39.) According to defendant, if the court instead were to use depreciated costs, the qualification for a duty allowance would vary by the year the merchandise in question would be imported, or by the age of the equipment used on the imported merchandise. *Id.* at 21. Thus similarly-positioned importers might receive disparate treatment for the same operation.

Plaintiff argues depreciation costs are proper. (Haggar's Post Trial Reply Br. at 19, 20.) Plaintiff argues Customs' practice has been to permit depreciation of the machinery, as in accordance with generally accepted accounting procedures. (Haggar's Post Trial Br. at 10.) According to plaintiff, the investment cost of the ovens was zero, as the ovens were 25 years old and fully depreciated when they were transferred to Mexico. *Id.* Permitting depreciation, the only remaining equipment for comparison would be the pressing equipment ($430,000), which would constitute 50 percent of assembly capital costs ($857,724). (Joint Stip. at 4) (total capital costs minus pressing & ovenbaking). If the court did not permit the depreciation of the oven to zero, the capital investment of the curing equipment would be $522,808, or 61 percent of the assembly capital costs. *Id.* The court cannot consider either of these figures as minor and finds that these factors weigh against granting a duty allowance under item 807.00.

(iii) Time Comparisons

The Federal Circuit in *General Motors* found "where operations . . . involve significantly automated or non-labor processes (*such as baking*), this factor provides little guidance on whether operations are of a 'minor nature.'" 976 F.2d at 720 (emphasis added). Ovenbaking is an automatic process which accounts for nearly one-third of the total operation time. (Revised Joint Stip. at 1) (dividing 15 minutes ovenbaking time by 42 minutes for total operation). The court, pursuant to *General Motors*, does not address this test here.

(B) Necessity and Logical Relatedness to Assembly

Mast factors 2 and 3 examine respectively whether the challenged operations were so related to assembly that they were necessary to the assembly process, and whether the challenged operations were so related to assembly as to be performed during assembly. *Mast*, 668 F.2d at 506.

The parties have stipulated that "[t]he effect of ovenbaking is to create crease retention and greater surface and seam flatness in the garment, and prevent wrinkling." (Stip. Facts ¶ 55.) These features are unrelated to assembly. The parties in fact have agreed that assembly occurs without the initiation of the curing process — pressing — so it follows the entire curing operation would be similarly unnecessary. (Stip. Facts ¶ 38.) The court finds that ovenbaking and pressing are not necessary, nor related to assembly. (Court's Findings, Tr. at 455, 503, 505-506.)

(C) Economic & Other Practical Considerations

The fourth *Mast* factor examines whether economic and practical considerations dictate that the challenged operations be performed concurrently with assembly. 668 F.2d at 506 n. 7.

Defendant argues that plaintiff cannot present any considerations requiring that curing be conducted concurrently with assembly, because curing does not begin until after assembly is completed. (Def.'s Post Trial Br. at 41-42.) According to defendant, *Mast* and its progeny demonstrate that "concurrently" with assembly only extends to actual joinder. *Id.* at 16 n. 10, 41-42.

The court does not agree with defendant's narrow interpretation of "concurrently." This restrictive interpretation would, in effect, require a showing that ovenbaking must be done during assembly because it is necessary to further assembly. However, this inquiry is already accomplished by the necessity requirement in *Mast*. The legislative history of item 807.00 demonstrates clear Congressional intent to permit duty-free treatment of a component manufactured in the United States if subjected to an operation "of a minor nature incidental to the assembly process, whether done before, during or after assembly." *Tariff Schedules Technical Amendments Act of 1965*, H.R. Rep. No. 342, 89th Cong., 1st Sess. 49 (1965).

The parties agree that, if the pants were packed and shipped to the United States immediately after assembly, but before curing, Haggar would incur additional costs for repacking and reshipping to the distribution centers. (Parties' Stip., Tr. at 545.) Moreover, an additional work shift would have to be added

to complete the ovenbaking and pressing at higher labor costs. *Id.* at 547. Mr. Ernie Ramirez, International Accounting Manager for Haggar, also testified that "throughput" time (total time from when the garment is cut to when it is received by the customer) would be increased by 3-4 days, and separating ovenbaking from assembly would result in higher transportation costs, increased production times, the need for additional facility investment, higher handling costs, and additional overhead expenses. (Tr. at 347, 399-402.) Finally, Mr. Frank Bracken, President of Haggar Apparel Co., testified that post-curing immediately after assembly was necessary because there was a risk with post-cured fabric that permanent creases and wrinkles would occur during shipping, and render the product "useless." (Tr. at 39, 49-50.) Although the curing operation does not preclude assembly from occurring, the court finds the curing of the fabric would logically occur at this time to minimize damages and economic costs. The court holds that economics and practicality dictate that Haggar cure its merchandise concurrent with assembly.

The court finds the costs of the curing operation are insignificant as a percentage of the fabricated components and of the entire operation. Moreover, strong economic and practical considerations dictate that curing be performed concurrently with assembly. After balancing the relevant factors, the court finds that the curing operation is "incidental to the assembly process" within the meaning of item 807.00, TSUS, and subheading 9802.00.80, HTSUS.

II. Advancement in Value

Defendant argues that, even if the *Mast* analysis results in a finding that the operation is minor, additional inquiry is necessary to determine whether the imported article has undergone a prohibitory advancement in value. (Def.'s Post Trial Br. at 23-26.) Therefore, according to defendant, the court should consider the importance to Haggar of the crease retention and the greater surface and seam flatness as an additional factor. *Id.*

Defendant's arguments are meritless. Item 807.00 provides that a duty allowance is permissible so long as the merchandise in dispute has not been advanced in value "except by operations incidental to the assembly process." Item 807.00(c), TSUS. Item 807.00 does not prohibit an advancement in value, therefore, so long as the operation in question is incidental to assembly.

III. 19 C.F.R. Section 10.16

Defendant contends 19 C.F.R. § 10.16 (1988) governs the application of item 807.00. Subsection 10.16(c) provides:

> Any significant process, operation, or treatment other than assembly whose primary purpose is the fabrication, completion, physical or chemical improvement of a component, or which is not related to the assembly process, whether or not it effects a substantial transformation of the article, shall not be regarded as incidental to the assembly and shall preclude the application of the exemption to such article.

19 C.F.R. § 10.16(c) (1988) (1989 version identical).

The court disagrees. Subsection 10.16(c) conflicts with the plain language of item 807.00. Item 807.00 does not prohibit operations which merely *impart new characteristics* to the article being assembled as the regulation provides, but in fact permits a duty allowance for such improvements to the articles so long as the operation imparting those characteristics was incidental to assembly. Moreover, the Federal Circuit has strongly qualified 19 C.F.R. § 10.16, *see Chrysler Corp. v. United States*, 1996 WL 132263 at *2 (Fed. Cir. 1992) (finding the cost comparisons in *General Motors* "determinative" over 19 C.F.R. § 10.16), or has ignored the regulation altogether, *see Mast*, 668 F.2d at 506 (developing factors); *General Motors*, 976 F.2d at 718 (citing, but not applying regulation); *United States v. Oxford Industries, Inc.*, 668 F.2d 507 (C.C.P.A. 1981) (applying *Mast* factors only). Indeed, defendant has recognized pursuant to the court's questioning that these decisions have cast considerable doubt on the regulation's validity. (Def.'s Suppl. Br. at 1-2.)

Finally, although defendant argues that Customs is entitled to deference pursuant to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984), the recent decisions in *Crystal Clear Industries v. United States*, 44 F.3d 1001 (Fed. Cir. 1995), and *Anval Nyby Powder AB v. United States*, Slip. Op. 96-80 (Ct. Int'l Trade My 21, 1996) may have put defendant's assertion into question. *See Crystal Clear*, 44 F.3d at 1003 (declining to apply *Chevron* deference to Customs in routine classification decisions); *see also Anval Nyby Powder AB*, Slip. Op. 96-80 at 12-13 (finding "court's statutory

obligation to find the correct result limits the court's ability to give special *Chevron* deference" to Customs' statutory constructions.) The court finds the Federal Circuit's test in *General Motors* as determinative.

CONCLUSION

The court in applying the *Mast* factors finds that the curing operation performed on Haggar's Model 245 Presstige men's pants, fabric style 2010, was a minor operation incidental to the assembly process under item 807.00, TSUS and subheading 9802.00.80, HTSUS. Customs is ordered to allow a duty allowance for the components in issue.

/s/ DOMINICK L. DICARLO
DOMINICK L. DICARLO
Chief Judge

Dated: July 12, 1996
New York, New York

APPENDIX D

UNITED STATES
COURT OF INTERNATIONAL TRADE

Court No. 93-06-00343

HAGGAR APPAREL COMPANY, PLAINTIFF

v.

UNITED STATES, DEFENDANT

Before: DICARLO, Chief Judge.

AMENDED JUDGMENT ORDER

This action having been submitted for decision, after trial and upon due deliberation, in conformity with the decision rendered, it is hereby

ORDERED that Customs grant a duty allowance under TSUS item 807.00 and HTSUS subheading 9802.00.80, for Haggar's Model 245 men's pants, fabric style 2010; and it is further

ORDERED that the United States Customs Service shall reliquidate the entries accordingly and shall refund all excess duties with interest as provided by law.

ORDERED that the action is dismissed.

/s/ DOMINICK L. DICARLO
DOMINICK L. DICARLO
Chief Judge

Dated: July 25, 1996
New York, New York